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23 **UNITED STATES DISTRICT COURT**

24 **DISTRICT OF NEVADA**

25 UNION PACIFIC RAILROAD COMPANY, a  
26 Delaware Corporation,

27 Plaintiff,

28 v.

WINECUP GAMBLE, INC., a Nevada  
Corporation,

Defendant.

Case No. 3:17-cv-00477-LRH-CLB

**WINECUP GAMBLE'S REPLY  
MEMORANDUM IN SUPPORT OF ITS  
FIRST MOTION IN LIMINE TO  
EXCLUDE DARYOUSH RAZAVIAN'S  
TESTIMONY RELATED TO MILE  
POST 670.03 [ECF No. 141]**

1           Defendant Winecup Gamble, Inc. (“Winecup”) submits this reply memorandum in  
 2 support of its First Motion in Limine (“Motion”) to exclude the opinions and testimony of  
 3 Plaintiff Union Pacific Railroad Company’s (“Union Pacific”) expert, Daryoush Razavian,  
 4 relating to the source of the water that caused damage to Union Pacific’s track at mile post  
 5 670.03, including his opinion that water from the 23-Mile Dam reached that location.

6 **I. INTRODUCTION**

7           Union Pacific’s Response attempts to confuse the issue at hand and distract from  
 8 Winecup’s arguments. In the process, Union Pacific mischaracterizes Lindon’s opinion, ignores  
 9 key aspects of Winecup’s Motion, provides a conclusory narrative about the path of the water in  
 10 lieu of facts and data, and focuses on an argument Winecup does not make.

11          This motion deals with a key factual dispute in the case: the source of the water that  
 12 caused the Union Pacific’s tracks to wash-out at mile post 670.03. The tracks at that location are  
 13 in the Loray Wash drainage, which drains water from the mountains to the west and to the south.  
 14 The 23-Mile Dam is on Thousand Springs Creek, which drains the mountains to the north. Union  
 15 Pacific asserts that water from the 23-Mile Dam left its drainage and reached mile post 670.03 in  
 16 sufficient quantity to cause the washout at that location. Winecup asserts that the damage was  
 17 caused by water from the Loray Wash drainage. This motion does not ask the Court to decide that  
 18 factual dispute. Rather, the issue in this Motion is whether Razavian can offer an expert opinion  
 19 on this issue that satisfies the requirements of Rule 702. Winecup’s Motion explained that the  
 20 answer is no.

21          Union Pacific’s Response does not show otherwise. While the Response shows that  
 22 Razavian can tell a story about the source of the water that aligns with Union Pacific’s theory,  
 23 that story is full of unsupported assumptions and conclusions. In addition, the Response  
 24 highlights that Razavian did not use any scientific methodology to reach his opinions. He did not  
 25 conduct a survey to determine relevant elevations to learn if it was even possible for water to  
 26 traverse from one drainage to the other. He did not use a hydrological computer model. He did  
 27 not identify the dividing line between the two drainages. He did not determine how much water  
 28 would have already been flowing in the Loray Wash during the flood. And he did not even

1 conduct an on-the-ground field investigation. Instead, his methodology amounted to looking at a  
 2 large scale topographical map that was not detailed enough to support the opinion he offers and  
 3 speculating about the source of ice. That is not a reliable methodology for determining whether  
 4 water could travel the course Union Pacific claims. More scientific rigor should be required for an  
 5 expert opinion on such an important claim.

6         In addition, Union Pacific's Response fails to address Winecup's argument that Razavian  
 7 failed to disclose any opinion related to the cause of the washout at mile post 670.03. For  
 8 example, Razavian has not offered any opinion about how much water would be needed to cause  
 9 the washout at mile post 670.03, how much water he claims escaped from the Thousand Springs  
 10 Creek drainage, or how much water was flowing in the Loray Wash at the time.

11         Finally, Union Pacific's attacks on Lindon's opinion are wrong. He has not offered  
 12 inconsistent opinions. Nor has he changed his opinions. Union Pacific simply misrepresents his  
 13 opinions. Moreover, Lindon did not offer two "demonstrably wrong" facts in the Motion. Union  
 14 Pacific claims that Lindon's description that the landscape was hummocky is wrong, but Union  
 15 Pacific refers to a different location than Lindon described. Likewise, Union Pacific claims that  
 16 Lindon was wrong in calling a geographic feature the "southern branch of the Loray Wash,"  
 17 claiming instead that feature is called "Tuttle Creek." But that is a meaningless dispute about  
 18 nomenclature. There is no debate that the southern branch of the wash exists—as demonstrated by  
 19 the satellite photos Union Pacific ignored. Moreover, the very document Union Pacific relies on  
 20 for the name Tuttle Creek shows the existence of both branches and uses the name Tuttle Creek  
 21 for both, meaning Tuttle Creek is simply an alternative name for the Loray Wash—it is not  
 22 referencing a different wash.

23         Winecup's Motion should be granted. Razavian should not be permitted to offer expert  
 24 testimony related to the source of the water that caused damage to Union Pacific's track at mile  
 25 post 670.03.

26         **II. RESPONSE TO UNION PACIFIC'S ASSERTION OF FACTS**

27         Winecup does not undertake to respond to all of the facts asserted by Union Pacific with  
 28 which Winecup disagrees. Instead, it will limit this response to correcting erroneous statements

1 about Lindon's opinion and to point out opinions by Razavian that are being raised for the first  
 2 time.

3       **A. Incorrect Statements Related to Lindon's Opinion.**

4 Union Pacific states that Lindon's hydrological model "is based on public domain data  
 5 without considering evidence from photos, eyewitnesses, and the like." Response at 2. That is  
 6 wrong. Lindon explained that he reviewed evidence to calibrate the hydrological model to ensure  
 7 that it matched observed reality. *See, e.g.*, Lindon Decl. at ¶ 15, ECF No. 120-1.

8 Union Pacific claims that Lindon's testimony about a "hummocky" landscape is wrong,  
 9 but Union Pacific misrepresents that testimony. Union Pacific claims that Lindon opined that the  
 10 land near Tecoma Road was hummocky. *See* Response at 2, 3, 9, 16, 20. But that is not the  
 11 correct location. Lindon stated that the hummocky landscape was north of mile post 670.03, not  
 12 near the Tecoma Road. *See* Lindon Decl. at ¶ 7, ECF No. 141-2. And Lindon should know; he  
 13 actually walked the land, unlike Razavian. The Tecoma Road is farther west. Notably, the  
 14 hummocky landscape Lindon referred to can be seen in the contour lines on the topographical  
 15 map Union Pacific relies on in the area between the Tecoma Road and mile post 670.03. *See*  
 16 Response at 4 (excerpt of map).

17 Union Pacific also criticizes Lindon's description that the Loray Wash has a southern  
 18 branch, claiming that an ancient document shows the southern branch to be a different wash  
 19 called Tuttle Creek. But that document simply provides a different name for a section of the same  
 20 wash—it does not show a different wash. This is simply a dispute about nomenclature. Moreover,  
 21 the document Union Pacific provides is fully consistent with Lindon's opinion and the satellite  
 22 photos Winecup included with its Motion (which Union Pacific ignored). Those photos show the  
 23 Loray Wash splitting into two branches near mile post 670.03, with the northern branch being a  
 24 straight, diversionary branch and the southern branch following a natural, meandering course. The  
 25 ancient document shows the same thing. It shows a curving branch labeled "Tuttle Creek" below  
 26 the track, and it shows a straight "pilot channel of Tuttle Creek" above the track. *See* ECF No.  
 27 153-35; *see also* Response at 8. That document calls *both* branches "Tuttle Creek," including the  
 28 northern branch that Union Pacific claims to be the only branch of the Loray Wash. This

1 document thus confirms Lindon's description. Whether labeled Tuttle Creek or not, both branches  
 2 are clearly part of the Loray Wash.

3 Finally, Union Pacific does not accurately describe the information contained in  
 4 Winecup's Third Supplemental disclosure. Response at 16. While Union Pacific mentions that the  
 5 supplemental disclosure contained an update of Lindon's model, it omits that the disclosure also  
 6 contained survey results and photographs taken during the survey. *See* ECF No. 153-2.

7 **B. Examples of New Opinions by Razavian.**

8 Union Pacific asserts, for the first time, that Razavian's opinion is that water from the 23-  
 9 Mile Dam crossed Highway 233 near Tecoma Road and then turned east to cross the tracks at  
 10 about mile post 669. Response at 2. That opinion is not mentioned in his expert report (ECF No.  
 11 141-28), his deposition, or the prior declaration he submitted in this case (ECF No. 111-7). Under  
 12 this new opinion, water from the 23-Mile Dam would have been in the Loray Wash drainage for  
 13 over a mile before reaching mile post 670.03. Razavian is now altering his opinion about the  
 14 course of the water to avoid the hummocky landscape.

15 Union Pacific also describes Razavian's opinion to be that "the water could not have come  
 16 from the west" and that this is proved "by proper use of accepted hydrological methodology for  
 17 determining runoff." Response at 2-3. This is yet another new opinion. Razavian has not  
 18 previously disclosed any opinion about a "hydrological methodology for determining runoff"  
 19 applied to the Loray Wash drainage. Moreover, this opinion is unsupported. Razavian has not  
 20 disclosed any information about the runoff from the mountains in the Loray Wash drainage, and  
 21 without that information, Razavian cannot offer an opinion about how much water would have  
 22 been in the Loray Wash.

23 Union Pacific also claims that Razavian now has an opinion that water from the Loray  
 24 Wash could not have washed out State Highway 233. Response at 6. Neither the factual basis for  
 25 that opinion or the methodology on which it is based is provided.

26 Union Pacific also asserts that "water could easily flow downhill near Tecoma Road, as  
 27 pictures and topographic maps prove." Response at 3. Again, that opinion is new. Moreover, it is  
 28 not supported by the topographical map, and Union Pacific does not identify any photographs it is

1 referring to. The topographic map shows an elevation of 4796 at the location where the Tecoma  
 2 Road intersects highway 233. But there are not any other relevant elevation markings to show  
 3 whether the Loray Wash or railroad are uphill or downhill from that location. Moreover, Union  
 4 Pacific and Razavian claim that water crossed highway 233 *near* that intersection, not at that  
 5 intersection. The topographical map does not support that assertion.

6 Finally, Razavian adds still another opinion that the Loray Wash had been dry for months  
 7 and could not have been the source of ice, claiming that any precipitation would have been in the  
 8 form of snow and not rain. Response at 7. That opinion also lacks any basis, ignores the common  
 9 occurrence of snow melting during sunny winter days and refreezing into ice, and is inconsistent  
 10 with the expert report of Union Pacific's own meteorologist who opines that the winter of 2016-  
 11 2017 was the fourth wettest on record. *See* Lavin Expert Report at 4-5, ECF No. 111-30.

### 12 III. ARGUMENT

#### 13 A. Razavian's Opinion about Milepost 670.03 Fails to Satisfy Rule 702.

14 Rule 702 requires an expert's testimony to be "the product of reliable principles and  
 15 methods." Yet Razavian's opinion is not based on any disclosed methodology. Indeed, Union  
 16 Pacific's Response does not even attempt to identify a methodology. *See* Response 20-22. The  
 17 lack of methodology is particularly significant here because there are recognized methodologies  
 18 that readily could have been used to address the factual issue in question. Razavian could have  
 19 gathered survey data to determine relevant elevations for the area between the two drainages, he  
 20 could have created a computer hydrological model, or he could have conducted an on-the-ground  
 21 field investigation. He did none of those things. The only thing Razavian did was look at a high-  
 22 level, low-detail topographical map. But the topographical map does not provide sufficiently  
 23 detailed elevation readings to support Razavian's opinion. As a result, his opinion related to mile  
 24 post 670.03 fails to satisfy Rule 702.

25 Razavian also fails to base his opinion on sufficient facts or data, as required by Rule 702.  
 26 To form an expert opinion that water escaped one drainage and joined another, an expert must  
 27 obtain essential data about relevant elevation points. But Razavian does not determine the  
 28 relevant elevations in the Thousand Springs Creek Drainage, he does not determine the relevant

1 elevations for the Loray Wash drainage, and he does not determine the relevant elevation for the  
 2 boundary between the Thousand Springs Creek drainage and the Loray Wash drainage. Likewise,  
 3 Razavian does not cite any underlying facts to determine how much water from the 23-Mile Dam  
 4 would have escaped its drainage. In addition, to support his new opinion that “water could not  
 5 have come from the west,” *see Response at 2-3*, Razavian would need underlying facts about the  
 6 amount of runoff from the mountains in the Loray Wash drainage and the amount of water  
 7 flowing in the Loray Wash during the relevant time period. But Razavian has not disclosed any  
 8 such facts, nor has he claimed to have based his opinion on those facts. Without doing so,  
 9 Razavian does not have the necessary facts to support his opinion about the source of the water  
 10 that reached mile post 670.03.

11 The limited information on which Razavian does rely is not sufficient to compensate for  
 12 the essential facts he is missing. The Response largely repeats the same facts already discussed in  
 13 the Motion, such as Razavian’s reliance on a 20-foot contour topographical map that is not  
 14 detailed enough to provide the relevant elevations, speculation about the source of ice, and  
 15 observations from locations that are already inside the Loray Wash drainage and cannot be used  
 16 to determine the source of the water.<sup>1</sup> As explained in the Motion, those facts do not provide a  
 17 sufficient basis to offer an expert opinion based on scientific knowledge. And without sufficient  
 18 facts, Razavian is merely offering an inadequately supported non-expert opinion. It should not be  
 19 permitted under Rule 702.

20           **B. Razavian Should Not Be Allowed to Offer Opinions That Were Not Disclosed.**

21           Winecup also points out in the Motion that even if Razavian were permitted to offer an  
 22 opinion that some water from the 23-Mile Dam escaped its drainage and reached mile post  
 23 670.03, he should not be allowed to expand his opinion and testify about topics not previously  
 24 disclosed, such as how much water from the 23-Mile Dam reached 670.03 or how much water  
 25 would be required to cause the washout at 670.03.

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26           \_\_\_\_\_  
 27           <sup>1</sup> The Response also discusses deposition testimony from various Union Pacific  
 28 employees, but Union Pacific admits that Razavian did not rely on the deposition testimony cited  
          in the Response. *See Response at 10*. As a result, that deposition testimony is not a basis for  
          Razavian’s opinion and is not relevant to this Motion.

1           Union Pacific's Response does not address that argument. Instead, it introduces two  
 2 different issues that Winecup did not raise. First, Union Pacific argues that it alleged from the  
 3 outset of the litigation that it was suing for damage to four washouts, including mile post 670.03.  
 4 *See* Response at 13-14, 18. But that is irrelevant to the Motion. Winecup's Motion does seek  
 5 dismissal of Union Pacific's claims concerning mile post 670.03. This Motion is about the  
 6 admissibility of Razavian's opinion testimony.

7           Second, Union Pacific argues that it disclosed some opinions from Razavian about mile  
 8 post 670.03. Again, Union Pacific misses the point of Winecup's argument. Winecup does not  
 9 dispute that Razavian disclosed the opinion (in his deposition) that some water from the 23-Mile  
 10 Dam escaped its drainage and reached mile post 670.03. Winecup asserts that testimony should  
 11 be excluded because it does not satisfy Rule 702. But that limited opinion is the extent of  
 12 Razavian's disclosure. He did not provide any further disclosure that would allow him to opine  
 13 about the cause of the washout at 670.03, or any other topic related to 670.03.

14           To the extent Union Pacific is attempting to claim that Razavian disclosed an opinion  
 15 about the cause of the washout at mile post 670.03 in his expert report, that argument fails. The  
 16 Response references a single sentence in paragraph 17 of Razavian's expert report. *See* Response  
 17 at 14, 19 (citing ¶ 17 on page 16 of Razavian's Report, ECF No. 141-28). But the cited sentence  
 18 does not contain any opinion about 670.03. It only refers to unnamed "washouts," and the context  
 19 makes clear that it is describing the three embankments downstream of the Dake Dam, not  
 20 670.03. Indeed, the sentence immediately preceding it specifically refers to mile posts 672.14,  
 21 677.32, and 679.32 and does not mention 670.03. The sentence preceding it also states that it is  
 22 discussing the "flood surge that was initiated from Dake." *Id.* at ¶16. That context is reinforced in  
 23 paragraph 17 itself, which says the washouts were "a direct results of the destructive forces of the  
 24 flood surge caused by failure of the 23-Mile Dam *and Dake's spillway/embankment.*" *Id.* at ¶17  
 25 (emphasis added). By referencing the flood coming from the Dake spillway, it is clear that  
 26 sentence is not referring to 670.03, as there is no dispute that water flowing through the Dake  
 27 spillway did not reach 670.03. Thus, it would be disingenuous to claim that this single sentence is  
 28 disclosing an opinion related to 670.03. And in any case, if that single sentence were interpreted

1 as a reference to 670.03, it would lack the foundational requirements of Rule 702. The expert  
2 report does not include any facts or data to support a causation opinion related to 670.03, nor does  
3 it reference any methodology.

4 **IV. CONCLUSION**

5 For the reasons set forth above and in the Motion, Winecup's First Motion in Limine  
6 should be granted.  
7

8 DATED: June 12, 2020

*/s/ Janine C. Prupas*

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**CERTIFICATE OF SERVICE**

I, the undersigned, declare under penalty of perjury, that I am over the age of eighteen (18) years, and I am not a party to, nor interested in, this action. On this date, I served a true and correct copy of the foregoing **WINECUP GAMBLE'S REPLY MEMORANDUM IN SUPPORT OF ITS FIRST MOTION IN LIMINE TO EXCLUDE DARYOUSH RAZAVIAN'S TESTIMONY RELATED TO MILE POST 670.03 [ECF No. 141]** via CM/ECF electronic filing on the following:

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